U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

DATE: JAN 10 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion and affirm its prior dismissal of the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an environmental scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO agreed with the director's decision and dismissed the appeal.

On motion, the petitioner submits a statement and supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The AAO discussed the petitioner's initial filing and appeal in detail in its August 3, 2010 dismissal notice (incorporated here by reference). The AAO need not revisit these prior events in detail here, but will provide discussion where necessary to place the petitioner's motion in its proper context.

The petitioner asserts, on motion, that he "was appointed as a single (fully in charge) editor of the book project [redacted] to

be published by the University of California Press in 2012." The AAO, in its prior decision, already discussed this project (although the petitioner did not have a contract with the University of California Press until January 2010). The AAO stated:

> the petitioner submitted evidence that, as of the date of filing, he was in the process of editing a book on tidal salt marshes of the San Francisco Bay estuary. . . . On appeal, the petitioner asserts that well established scientists would not have agreed to write a chapter for the book unless the editor was well respected and distinguished. The book, however, had yet to be published as of the date of filing and, as such, its ultimate influence in the field is unknown.

On motion, the petitioner states:

> The book is a collaborative effort of 42 well established U.S. scientists and 15 reviewers with [the petitioner] serving as a scientific leader of the project. It is logical that 42 well established scientists would . . . entrust their original work only to a well respected and distinguished scientist like in this case [the petitioner]. . . . By stating . . . that "the book had yet to be published . . . , as such its ultimate influence in the field is unknown," it is the same as by analogy stating that "by building a bridge over the river between two important cities, the influence of the bridge on cities is unknown." Why would people build the bridge (that requires so much efforts and investment) if they have no idea about its future impact?

The petitioner arbitrarily compares the publication of a book to the construction of a bridge, but does not show that the two are comparable in any meaningful way. The petitioner essentially argues that the intended book must be important, because otherwise its contributors would not think it worth the effort. The AAO notes that, while the petitioner has submitted a list of "contributing authors," the record contains no first-hand evidence that those authors have in fact committed to the project. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The very act of editing a book (or planning to do so in the future) does not automatically earn the editor a national interest waiver. The burden is on the petitioner to establish that his particular book is especially noteworthy. He cannot meet this burden simply by describing the project and declaring that any project fitting that description must be important. The AAO rejects the claim that the book's importance is self-evident, even before its completion and publication.

The petitioner quotes from a previously submitted letter from Professor [redacted]. The AAO, however, had already addressed that letter, stating:

> [redacted] and one of the petitioner's collaborators states that the book "is expected to be widely read

> nationally and internationally by the scientific community, especially those interested in estuaries and wetlands." . . .
>
> [redacted] further asserts that in 2007, the petitioner cofounded the [redacted] based in Vilnius, Lithuania and Berkeley, California, which he now directs. [redacted] explains that the institute intends to expand collaborations between the European Union and the United States in developing and promoting ecologically sound technologies worldwide. [redacted] however, provides no examples of any actions taken by the institute or the influence of those actions. As stated above, the national interest waiver contemplates future contributions by the alien but is not intended to facilitate the entry of an alien whose benefit to the national interest would be entirely speculative. . . . Without evidence that [redacted] under the petitioner's direction, has already developed a track record of success, the fact that the petitioner founded and directs the institute does not warrant a waiver of the alien employment certification process in the national interest.

The petitioner does not rebut the AAO's prior findings. He simply repeats the claim that his unfinished project must be important, or else no reputable scientist would bother to contribute to it.

The petitioner then observes that he published a book "based on his previous research on temperature and population adaptation." The petitioner submits no evidence that anyone has purchased or cited this book. Instead, he claims that its very publication "is a recognition by the Publisher [of the petitioner's] international influence in his research area." The petitioner did not submit any evidence that the publisher, [redacted], subjects submissions to peer review or other critical content evaluation. Because one can publish virtually anything through a vanity press or print-to-order publisher, the mere existence of a published book is not "recognition . . . [of] international influence." The petitioner must establish the significance of the publication.

Furthermore, this publication took place well after the petition's July 9, 2008 filing date. An electronic mail message from the publisher, acknowledging receipt of the petitioner's manuscript, is dated December 6, 2009. A follow-up message, dated January 22, 2010, informed the petitioner that his book "has been published" and "is now sent for printing." Therefore, even if publication established the importance of the work, which it does not, the January 2010 publication of a book could not retroactively show that the petitioner already qualified for a waiver in July 2008. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The AAO stresses that it cites this case law to show that new developments cannot retroactively establish eligibility, not to imply that the present petitioner has in fact "become eligible under a new set of facts."

The petitioner claims (and documents) that his "latest published article," from 2007, has been "already cited 9 times," once in 2008, and four times each in 2009 and 2010. The petitioner claims

that this citation rate is "significantly above average in Ecology field." The petitioner cites statistics said to be from "ISI Science Index," but submits no supporting evidence. Therefore, it is impossible to tell whether the petitioner has misquoted the statistics or taken them out of context. The same goes for the petitioner's assertion that that "majority of scientists in U.S. with Master of Science degree during their career don't publish any peer reviewed scientific publications," a statistic that the petitioner attributes to the "International Institute of Education 2007."

The petitioner asserts that the *Biological Journal of the Linnean Society*, which published his 2007 article, "is cited 4.0 times per year." The petitioner appears to refer to the journal's impact factor, which reflects the average citation rate of articles in a given journal. If the petitioner's figure is correct in this regard, then his article, cited no more than four times in any given year, is consistent with the journal's overall impact factor. In this light, the citation history shows that the petitioner's article is an "average" article for the journal, rather than an unusually influential contribution.

All of the documented citations claimed on motion appeared after the petition's July 9, 2008 filing date. Therefore, even if nine citations over several years were an unusual achievement, these citations would not continue a pattern of heavy citation that already existed as of the filing date.

Apart from the citation issue, the petitioner does not explain why he has not produced any further published work since his "latest published article" appeared in 2007. The petitioner had previously submitted a copy of his *curriculum vitae*, which identified two later articles, one said to be "in press" and the other "in review." There is no evidence that either article ever appeared in print.

The petitioner's motion to reopen combines assertions repeated and/or revised from earlier submissions, new information inapplicable to the 2008 filing date, and unsupported speculation. The petitioner has not shown that the AAO erred in dismissing the appeal, or that the petition was approvable when filed in 2008. The AAO will therefore affirm its prior finding.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The AAO's decision of August 3, 2010 is affirmed. The petition remains denied.